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June 29, 1998

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Regina Keeney, Chief  
International Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 800  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Re: DBS Public Interest Obligations, MM Docket No. 93-25; **EX PARTE***

Dear Ms. Keeney:

In the above-captioned proceeding, the Commission is considering, among other issues, how best to implement Section 335(a) of the Communications Act. Section 335(a) requires the Commission to examine the feasibility of imposing public interest obligations on direct broadcast satellite ("DBS") service providers, and requires the Commission, at a minimum, to apply some version of the Communications Act's political broadcasting rules to DBS providers, *i.e.*, the reasonable access requirement of Section 312(a)(7) and the equal opportunity requirements of Section 315 of the Communications Act to DBS providers.<sup>1</sup>

<sup>1</sup> See 47 U.S.C. § 335(a). Section 312(a)(7) of the Communications Act requires broadcast stations to afford legally qualified candidates for federal elected office reasonable access to their facilities, or to permit such candidates to purchase "reasonable amounts of time." Section 315(a) provides that if a broadcast licensee permits any legally qualified candidate for public office to use its station, the licensee must afford equal opportunities

June 29, 1998

Page 2

DIRECTV, Inc. ("DIRECTV") has addressed the application of the broadcast "reasonable access" and "equal opportunity" requirements to DBS providers, and has urged that they be tailored to account for the inherently national scope and non-local nature of DBS service. For example, in its original Notice of Proposed Rulemaking, the Commission correctly recognized that the feasibility of offering "reasonable access" to all federal candidates depends on the degree to which a DBS operator is offering localized or regionalized programming.<sup>2</sup> At present, this is not the case. DBS is a national service, serving the entire continental United States, and permitting every federal candidate to gain mandatory access to DBS systems would impose an unreasonable and onerous burden on DBS providers that makes no policy sense in light of present DBS national service configurations.<sup>3</sup> Similarly, to the extent that such requirements are made applicable, DIRECTV has urged the Commission to allow DBS providers reasonable discretion to control the placement of political advertisements in their programming schedules, and to continue its policy of trusting the "good faith judgments of licensees to provide reasonable access to federal candidates," including the discretion to take into account their "broader programming and business commitments."<sup>4</sup>

DIRECTV understands that the Commission recently has been considering applying political broadcasting obligations to the DBS service by requiring DBS providers themselves to require compliance with political broadcasting requirements in their programming contracts. DIRECTV does not believe that such a proposal is either desirable or workable in today's MVPD marketplace.

Programming networks typically assemble the programming for their networks (including the commercial advertising included therein) at "playout" centers and then create a single uniform feed of their daily service. That feed is uplinked from the playout center to one of

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to all other candidates for that office in the use of the station. The charges made for the use of the station during the 45 days preceding the primary election and the 60 days preceding the general election may not exceed the lowest unit charge of the station for the same class and amount of time for the same period.

<sup>2</sup> *Initial Notice*, 8 FCC Rcd 1589 (1993), at ¶ 24.

<sup>3</sup> Subscribers in Florida, for example, have little interest in the elections of Representatives for Congressional districts in Wyoming. Moreover, the capacity required to provide such coverage for elections in each state would be enormous. Any reasonable access obligation applied to DBS thus should be limited to elections for national office, *e.g.*, Presidential and Vice Presidential races.

<sup>4</sup> Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 681 (1991); *see Initial Notice*, 8 FCC Rcd 1589 (1993), at ¶ 22.

June 29, 1998

Page 3

several communications satellites covering the United States used for video transmission.<sup>5</sup> These networks deliver their services to their distribution affiliates (whether such affiliates operate via cable, DBS, SMATV, MMDS, or other technology) via the same signal from the same satellite. Distributors either downlink the signal directly from the designated communications satellite, receive the feed via fiber optic link from the playout center, or receive the signal of the service from a DBS satellite via a transport arrangement with DIRECTV, Echostar or PrimeStar, for retransmission to subscribers of the affiliate's system.

Thus, DBS distributors downlink at their earth station facilities the same satellite signals of programming networks that cable distributors downlink at their head-ends. The only difference in the service as transmitted to subscribers of each system is that, for some networks, cable systems historically have inserted local advertising into the signals at the head-end. The market created by local businesses seeking inexpensive on-air promotional opportunities has provided regional cable system operators a means of offsetting the costs of their programming by selling ad time.

By contrast, DBS distributors do not insert third-party advertising into programming network signals, primarily because of the technological constraints of DBS broadcast facilities. These facilities were created only for purposes of downlinking and uplinking satellite signals and typically do not have production capabilities. In addition, national advertisers have not been interested in buying time on DBS systems that reach relatively few viewers (*e.g.*, approximately 3.7 million viewers in DIRECTV's case) when compared to the 40, 50, or 60 million homes that a cable-carried network reaches. This combination of technological constraints and market incentives has prevented DBS distributors from being able to insert advertising in the same way that cable systems can at a head-end, and has discouraged DBS distributors from developing an advertising sales business.<sup>6</sup> In fact, DBS providers generally are contractually prohibited from altering daily programming schedules of the channels they carry, whether to accommodate political broadcast time, or otherwise.<sup>7</sup>

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<sup>5</sup> Occasionally that same feed is also transmitted via satellite outside the United States for broadcast in other countries.

<sup>6</sup> Accordingly, unlike cable networks and cable systems, DBS distributors do not have a rate card for the sale of advertising time on their services. This lack of a rate card would make lowest unit charge obligations extremely difficult to administer were the obligation to apply to subscription DBS services.

<sup>7</sup> In addition, the Copyright Act subjects DBS providers and other satellite carriers to copyright infringement liability for willful alteration through "changes, deletions or additions" to superstation or broadcast network station transmissions. See 17 U.S.C. § 119(a)(4).

June 29, 1998

Page 4

For these reasons, the imposition of reasonable access or equal opportunity obligations does not make sense. Although the contractual enforcement mechanism proposal recognizes that fact by attempting to incorporate the notion of programmer responsibility, DIRECTV nonetheless believes that a proposal that would attempt to force intervention by a DBS provider into the business of particular programmers in order to enforce compliance with political broadcasting rules is inherently unworkable for at least two reasons.

First, it is unrealistic to expect that programmers will, of their own volition, create a separate "DBS feed" necessary to meet the requirements of Section 312(a)(7) and Section 315. Due to the operational and programming costs of assembling the feed of a network service and of leasing satellite capacity to make it available to distributors, and considering the consistency and uniformity that networks naturally desire for their service regardless of the form of distributor technology, it is impracticable and economically infeasible for such networks to create more than one feed for their services.<sup>8</sup> Because other MVPD technologies are not required to comply with Section 312(a)(7) and Section 315(a) requirements, programmers simply will not alter existing feeds to accommodate regulatory obligations imposed on only one type of MVPD technology whose subscribers represent a minority of the total subscribers to whom the programming is distributed.

Second, DBS distributors have no leverage to insist that programmers take measures to comply with political broadcasting requirements. DBS providers generally are severely disadvantaged in their negotiations with most major programming networks because DBS providers have significantly fewer subscribers than their cable competitors, which continue to exercise MVPD market power. Because of this lack of bargaining power, DBS distributors historically have received rights to distribute programming only on premium terms, including significantly higher rates, and generally have been unsuccessful in obtaining some of the basic rights available to other distributors, including, in some cases, the ability to sell advertising time on cable-carried networks.<sup>9</sup>

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<sup>8</sup> The one exception is for purposes of time-shifting programming to recognize different time zones within the country (*i.e.*, several programmers have both an east coast and a west coast feed of their service).

<sup>9</sup> Congress recognized the lack of bargaining power that alternative MVPDs such as DIRECTV face, particularly in dealing with vertically integrated cable programmers, and enacted the program access protections of 47 U.S.C. § 628 to help address this problem. Nevertheless, although the law's passage helped "break the logjam" in bringing such programmers to the table, DBS operators in many instances have been forced as a matter of business necessity into programming arrangements with terms less favorable than those received by cable operators.

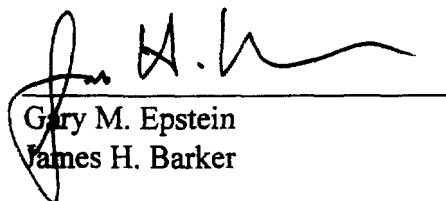
June 29, 1998

Page 5

In sum, DIRECTV believes that it would not be in the public interest to impose a contractual enforcement mechanism for DBS political advertising requirements that has little practical possibility of successful implementation. Due to the significant costs incurred by the programming networks in creating feeds and the lack of leverage of DBS distributors in their programming negotiations, it is extremely unlikely that any DBS distributor could force a programming network to create a separate DBS feed for a service for any price.

When Congress in 1992 sought to impose political broadcasting requirements on DBS providers through Section 335(a), there were no operating DBS businesses, and the extent to which DBS providers would choose business models based on the sale of advertising was not clear. What is clear today now that DBS systems have begun to provide service to subscribers is that the broadcast "reasonable access" and "equal opportunity" requirements should be tailored to account for the inherently national scope and non-local nature of DBS service. In particular, these requirements should apply to DBS providers *only* if such providers (like broadcasters) are selling advertising time on the programming that they carry. If they do not, the Commission should make it clear that political broadcasting requirements are inapplicable. Burdening DBS providers with excessive regulation that will only hinder their ability to compete with the entrenched cable industry and provide the benefits of increased MVPD competition to consumers clearly is not in the public interest.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "G. M. Epstein" followed by a flourish, is written over a horizontal line. Below the line, the names "Gary M. Epstein" and "James H. Barker" are printed in a serif font.

Counsel for DIRECTV, Inc.

LATHAM & WATKINS

June 29, 1998

Page 6

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Harold Furchtgott-Roth  
Commissioner Michael Powell  
Commissioner Gloria Tristani  
Laurie Sherman, IB  
Rosalee Chiara, IB